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Supreme Court, U.S.
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No. 95-1047

In The

Supreme Court of the United States

October Term, 1995

BETTY NOBLE, WILLIAM P. NOBLE and BONNIE HYNOSKI,

Petitioners,

vs.

COLUMBIA COUNTY REDEVELOPMENT AUTHORITY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Are preliminary objections, filed pursuant to § 1-406(a) of the Eminent Domain Code of Pennsylvania, the exclusive method for challenging Declarations of Taking, and does a condemnee waive any objections not raised in that manner, and does the procedure established by § 1-406(a) comply with all constitutional requirements?

2. May the preliminary objections of a condemnee be properly dismissed without an evidentiary hearing, if those preliminary objections raise no factual issues, but rely solely on legal arguments?

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COUNTER-STATEMENT OF THE CASE

The Columbia County Redevelopment Authority ("CCRA"), *acting as the duly authorized agent of the Department of Community Affairs of the Commonwealth of Pennsylvania ("DCA")*, filed Declarations of Taking against the Petitioners ("Petitioners") in this case. The preliminary objections filed by the Petitioners raised only the following limited issues, all of which are solely legal in nature, and not based on any disputed questions of fact:

1. That the Declarations of Taking were void because CCRA was acting *ultra vires* of the powers vested in it pursuant to 25 Pa. C.S.A. § 1701 *et seq.;*

2. That the Declarations of Taking were void because DCA does not have the power to acquire property by Eminent Domain;

3. That the Declarations of Taking were void because DCA had not been delegated the authority to acquire property by Eminent Domain by the Commonwealth of Pennsylvania ("Commonwealth");

4. That the Declarations of Taking were void because they constituted a taking of property without due process of law and without the posting of property security, in violation of the United States Constitution; and

5. That the Declarations of Taking were void because they constituted a taking without the posting of proper security, in violation of the Eminent Domain Code, as amended, and in violation of the Pennsylvania Constitution.

These issues were the *only* issues raised by the Petitioners.

Along with their objections, the Petitioners filed a two-page Memorandum of Law Sur Preliminary Objections to Declaration of Taking (the "First Memorandum").

On March 24, 1993, the Court of Common Pleas of the 26th Judicial District of Pennsylvania, Columbia County Branch, issued a Notice for Argument Court, which required that the briefs of the Petitioners be filed by April 15, 1993, and that the brief of CCRA be filed by April 30, 1993. On April 19, 1993, the Petitioners, in apparent recognition of the inadequacy of their original memorandum of law, filed another document entitled "Memorandum of Law for Preliminary Objections to Declaration of Taking" (the "Second Memorandum"). The Second Memorandum attempted to raise factual issues which had not previously been raised in either the Petitioners' preliminary objections or in their First Memorandum. In dismissing the Petitioners' preliminary objections, the Court of Common Pleas of the 26th Judicial District of Pennsylvania, Columbia County Branch, based its decision, in part, upon the limited number of legal issues raised by the Petitioners in their preliminary objections.

The Petitioners then filed an appeal to the Commonwealth Court of Pennsylvania, which denied the appeal in an Opinion and Order dated April 28, 1995. In denying the Petitioners' appeal, the Commonwealth Court of Pennsylvania held, *inter alia*, that: (a) "*It is uncontradicted in this case that CCRA was acting as an agent of the DCA when it filed the declarations of taking and that CCRA had entered into a contract with the DCA to act as its agent for that purpose.*" Commonwealth Court Opinion at Page 6 (emphasis added); (b) No statutory provisions prohibited CCRA from acting as DCA's agent in filing the declarations of taking, and DCA was itself specifically statutorily empowered with the ability to condemn, and could and did lawfully delegate those powers to CCRA; and (c) Since

the Commonwealth has the power of taxation, CCRA, as the Commonwealth's agent, was not required to post a bond, pursuant to Section 403 of the Eminent Domain Code, 26 P.S. § 1-403. The Petitioners then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which denied the petition on September 27, 1995. The Petitioners' Petition for a Writ of Certiorari to this Court then followed.

SUMMARY OF ARGUMENT

The essential relevant legal issue in this case rests with Section 1-406(a) of the Pennsylvania Eminent Domain Code (the "Code"). Section 1-406(a) clearly states that objections to a declaration of taking which are not raised by timely preliminary objections are waived. The Petitioners raised only five limited legal issues in their preliminary objections. Based upon the explicit provisions of the Code, as well as the case law interpreting § 1-406(a), there is no question whatever that the Petitioners were precluded from trying to raise additional factual disputes in their Second Memorandum. The Petitioners attempted similar ploys with the Pennsylvania Commonwealth Court, the Pennsylvania Supreme Court, and with this Court as well. The factual matters raised by the Petitioners in their Petition are clearly and unquestionably irrelevant in this appeal. *None of the factual issues raised in the Petitioners' Petition was the subject of any timely preliminary objections to the Declarations of Taking, and those factual issues have therefore been waived.* Specifically, in their Petition to this Court, the Petitioners assert, on p. 22, that "Petitioners asserted below that the underground mine fire had burned through the coal under their property, and could not now burn back and endanger their property as there was [sic] no longer any combustible materials to fuel the fire." Petition for a Writ of Certiorari, at p. 22. In fact, the Petitioners did *not* make this assertion below. This assertion does *not* appear anywhere in the Petitioners' preliminary objections to the Declarations of Taking.

As to the five limited legal issues which the Petitioners did timely raise, those issues were all properly decided by the Pennsylvania Court of Common Pleas in a manner adverse to the Petitioners, and the Common Pleas Court's decision was properly upheld by the Pennsylvania Commonwealth Court. Specifically, the Petitioners maintained, in their preliminary objections, that CCRA had no power to act as DCA's agent in effectuating the condemnations, but § 1702 of the Urban Development Law of Pennsylvania, 35 P.S. Section 1701 *et seq.* (Purdon's 1993) (the "URL") clearly authorizes Pennsylvania's county redevelopment authorities to act as agents of the Commonwealth in order to accomplish various public purposes, including the provision of healthful homes and a decent living environment. Further, although the Petitioners argued that DCA had no power to condemn, DCA is clearly authorized by 71 P.S. § 1049.4 (Purdon's 1990) to exercise the power of eminent domain. Further, while the Petitioners argued that CCRA should have been required to post a bond, it is readily apparent that no bond was required, because CCRA was acting as an agent of DCA, the actual condemnor, and because § 1-403(b) of the Code plainly states that no bond is required if a condemnor has the power of taxation.

REASONS FOR DENYING THE WRIT

I.

PRELIMINARY OBJECTIONS FILED PURSUANT TO § 1-406(a) OF THE EMINENT DOMAIN CODE ARE THE EXCLUSIVE METHOD TO CHALLENGE THE DECLARATIONS AND ANY OBJECTIONS NOT SPECIFICALLY RAISED IN THAT MANNER ARE WAIVED.

In the second of their Reasons for Granting the Writ, the Petitioners assert, *inter alia*, that an evidentiary hearing was constitutionally required to determine if the threat of an underground mine fire still existed. Petitioners then argue that they raised this issue in their preliminary objections. Specifically, Petitioners state that they ". . . asserted by their preliminary objections that . . . while their property might have been endangered by the underground mine fire in 1983 when federal funds had been appropriated their property was not so endangered when it was condemned in 1993, some ten years later." Petition for a Writ, at p. 20. The assertion that Petitioners raised this issue in their preliminary objections is totally inaccurate, and it finds no support whatever in the record in this case. The Petitioners are apparently attempting to seduce this Court with myths and factual inaccuracies. The Petitioners did not allege, and could not prove, that their properties were no longer endangered by the mine fire, so they have apparently resorted to using their Petition as a mechanism for attempting to create "facts" which are simply not true. The Petitioners had an opportunity to raise any of these "facts" in their preliminary objections to the declarations of taking, and they elected not to do so. It is improper, and contrary to the specific provisions of Pa. R. A. P. No. 1115, for the Petitioners to attempt to raise such "facts" in their Petition.

In short, the Petitioners had every opportunity to obtain and present evidence, *had their preliminary objections raised any factual issues.* The relevant inquiry in this case is not whether the Petitioners had the right to obtain and present evidence, but whether or not that right was waived, and whether or not, on appeal, that right can somehow be magically resuscitated.

The real issue in this case is the scope of § 1-406(a) of the Code, which provides as follows:

> *Within thirty days after being served with notice of condemnation, the Condemnee may file preliminary objections to the declaration of taking.* The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or the right of the condemnor to appropriate condemned property, unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. *Failure to raise these matters by preliminary objection shall constitute a waiver thereof.*

26 P.S. § 1-406(a) (Purdon's Supp. 1992) (emphasis added); *In re Condemnation by Commonwealth of Pennsylvania, Department of Transportation (Bernstein Appeal),* 112 Pa. Commw. 368, 535 A.2d 1210, 1214 (1988); *app. denied,* 519 Pa. 656, 546 A.2d 60 (1988). The Code further provides that the preliminary objections "shall state specifically the grounds relied upon" and "shall be raised at one time and in one pleading." 26 P.S. § 1-406(b) and (c) (Purdon's Supp. 1992).

Accordingly, it is well recognized that objections which are not specifically raised by timely preliminary objections filed pursuant to § 1-406(a) of the Code are waived and may not be raised in pleadings or briefs filed beyond the time limit set forth in the Code. *See McCullough v. Commonwealth of Pennsylvania, Department of Transportation,* 134 Pa. Commw. 95, 578 A.2d 568, 571 (1990) (failure to raise issues in preliminary objections constitutes waiver); and *Bernstein Appeal,* 112 Pa. Commw. 368, 535 A.2d 1210, 1215 (1988), (issue which was not raised in preliminary objections may not be raised in pleadings filed beyond the thirty days permitted under § 1-406(a) of the Cod

In the present case, there is no dispute that the preliminary objections and First Memorandum of the Petitioners were filed within thirty (30) days of the filing of the Declarations of Takings. Moreover, there is no dispute that the Petitioners have attempted, through these documents, to raise five (5) limited legal issues. In their Second Memorandum filed on April 19, 1993, however, the Petitioners attempted to raise additional objections which were not raised as part of their preliminary objections.

For example, the Petitioners contend in their Second Memorandum that "[a]n issue now before the court is whether there has ever been a proper determination of danger from the mine fire concerning any of the properties." Second Memorandum at 1. Nowhere in their Preliminary Objections, however, did the Petitioners ever mention, much less argue, the issue of whether the subject properties are in danger from the mine fire. Accordingly, that issue was waived, and it could not be properly raised by the Petitioners for the first time in their Second Memorandum.

Similarly, the Petitioners attempted to raise an argument in their Second Memorandum that CCRA, in condemning the

subject properties, did not comply with "the Contracted prerequisites for so doing including those set forth in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.*" Second Memorandum at 2. The Petitioners then go on to cite the language of the Uniform Relocation Act at length. *See* Second Memorandum at 8-11. One searches the Preliminary Objections of the Petitioners in vain, however, for any mention of the Uniform Relocation Act or of any failure of CCRA to follow that Act or to live up to any contractual obligation imposed upon it by DCA. Once again, the failure of the Petitioners to specifically raise these issues in their preliminary objections constituted a waiver.

The Pennsylvania Common Pleas Court properly refused to allow the Petitioners to employ their Second Memorandum as a vehicle to raise new objections which they failed to raise in accordance with the specific and exclusive procedures provided for in the Code. The Pennsylvania Commonwealth Court specifically upheld this decision by the Pennsylvania Common Pleas Court. If the Petitioners believed that there was any merit to their arguments concerning the danger presented by the mine fire, the requirements of the Uniform Relocation Act, or the obligations of the contract between DCA and CCRA, they were bound to raise such arguments by timely-filed preliminary objections under the Code. Their failure to do so constitutes an unequivocal waiver of those claims. The purpose of requiring the Petitioners to file a memorandum of law is to allow the Petitioners an opportunity to offer legal argument to support the issues which they properly attempted to raise in their preliminary objections. However, the submission of briefs or memoranda cannot be utilized as a mechanism for circumventing the Code's strict requirement that timely preliminary objections are the exclusive method for challenging a declaration of taking. *See Bernstein Appeal,* 535 A.2d at 1215 (court will not allow

Petitioners to do indirectly what they are no longer permitted to do directly).

Accordingly, the Petitioners are incorrect when they argue that "[evidentiary hearings are required to establish that the properties subject to the declaration of taking are, in fact, threatened by the mine fire." Second Memorandum at 9. By failing to raise this purported issue of fact by a timely-filed Preliminary Objection, the Petitioners have waived any right to an evidentiary hearing on this factual issue. *See Bernstein Appeal,* 535 A.2d at 1215 (trial court need not conduct evidentiary hearing on factual issues not raised in timely-filed preliminary objections).

Moreover, even if the Pennsylvania Common Pleas Court were directed to consider the question of whether the subject properties are in fact threatened by the mine fire, the Petitioners have offered nothing to support their claim that CCRA made an improper determination on that issue. Condemnation presupposes that a condemnor exercised its considered judgment and discretion prior to the initiation of a formal action. *Westrick v. Approval of Bond of Peoples Natural Gas Co.*, 103 Pa. Commw. 578, 520 A.2d 963, 965 (1987). In reviewing an administrative decision to condemn, the Common Pleas Court is limited to determining whether the actions of the condemnor constitute fraud, bad faith or an abuse of discretion. *Downingtown Area School District v. DiFrancesco,* 125 Pa. Commw. 264, 557 A.2d 819, 820 (1989). There is a presumption that the acts of the condemnor are for the public good, and a Court may not substitute its own discretion for that of the administrative body. *Westrick,* 520 A.2d at 965-66. The burden of proving that the condemnor abused its discretion is on the party filing the preliminary objections, and that burden is a heavy one to meet. *Downingtown Area School District,* 557 A.2d at 820-21; *see also Westrick,* 520 A.2d at 966.

In the present case, the Petitioners offered nothing in their Preliminary Objections or supporting papers that gives the slightest indication that CCRA improperly exercised its discretion in determining that the subject properties were threatened by the mine fire. Indeed, nowhere did the Petitioners allege that CCRA acted fraudulently, in bad faith, or in abuse of its discretion. The Petitioners could not create an "issue of fact" merely by questioning CCRA's determination for the first time in their Second Memorandum, or in the Petition which they have filed before this Court. This conclusion is especially mandated in this case, since the Petitioners have failed to offer even a scintilla of support for their claim that the subject properties are not threatened by the mine fire.

In sum, by failing to assert the issues in timely preliminary objections, the Petitioners have waived any objections concerning: CCRA's determination that the subject properties were threatened by the mine fire; or the obligations imposed on CCRA by its contract with DCA; or the requirements of the Uniform Relocation Act. If the Pennsylvania Common Pleas Court or the Pennsylvania Commonwealth Court had allowed the Petitioners to raise these arguments by way of their Second Memorandum, the entire scheme and purpose of the Code's special procedures would have been defeated. This Court should similarly refused to entertain the Petitioners belated arguments at this time. This case does not involve any legitimate due process claims; to the contrary, the issue in this case is *waiver.* By failing to raise factual issues concerning the mine fire in their preliminary objections, the Petitioners clearly waived their right to a hearing on these issues.

II.

THE ISSUES RAISED IN THE PRELIMINARY OBJECTIONS OF THE PETITIONERS SOLELY CONSTITUTED LEGAL ARGUMENTS, WHICH THE COMMON PLEAS COURT PROPERLY DETERMINED WITHOUT AN EVIDENTIARY HEARING.

The language of § 1-406(e) of the Code states, in pertinent part, as follows:

> (e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. . . . If an issue of fact is raised, the court shall take evidence by depositions or otherwise.

26 P.S. § 1-406(e) (Purdon's Supp. 1992). It is well settled that, in light of this language, an evidentiary hearing is required only where there are disputed issues of fact. *Miller v. Commonwealth of Pennsylvania, Department of Transportation*, 91 Pa. Commw. 622, 498 A.2d 1370, 1372-73 (1985). Where there are no disputed facts, and the issues before the Court are purely legal, the Court may rule on preliminary objections without a hearing. *Id.*, 498 A.2d at 1373 (citing *Milas Appeal*, 36 Pa. Commw. 1, 387 A.2d 183 (1978)).

In the present case, the Petitioners raised five (5) objections as their Preliminary Objections. The first three (3) objections involve legal questions concerning the power of DCA and CCRA to condemn the subject properties. The last two (2) issues deal with the legal question of whether the CCRA, while acting as an agent for the Commonwealth, was required to post security as

part of these condemnations. The Common Pleas Court, accordingly, was able to resolve all of the Preliminary Objections raised by the Petitioners without the scheduling of a hearing. Moreover, as is set forth below, each of the five (5) objections raised by the Petitioners was without merit and was properly overruled by the Common Pleas Court.

A. In Condemning The Subject Properties, CCRA Was Acting Within The Powers Given To It By The Legislature.

In condemning the subject properties, CCRA was not exercising its eminent domain power to acquire any "blighted property" under Section 1712.1 of the URL. Accordingly, there was no need for the CCRA to have the subject properties declared "blighted" pursuant to the provisions of the URL. The Petitioners' continual attempts to raise this issue seem to have been designed to misdirect the focus of the Pennsylvania Common Pleas Court, the Pennsylvania Commonwealth Court, and this Court as well.

The Petitioners argue that the provisions of the URL limit the exercise of an authority's power of eminent domain only to areas that have been declared "blighted." In truth, however, the URL grants much broader powers of eminent domain to authorities. Indeed, Section 1712 of the URL gives authorities the power to:

> . . . exercise the right of eminent domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, of the same class as the city or county in which such Authority is organized to operate. . . .

35 P.S. § 1712 (Purdon's 1993).

More important, the URL specifically empowers CCRA to "act as an agent of the State or Federal Government or any of its instrumentalities or agencies for the public purposes set out in [the URL.]" 35 P.S. § 1709(d). The "public purposes" set forth in § 1702 of the URL include "encouraging the provision of healthful homes [and] a decent living environment. . . ." 35 P.S. § 1702. Moreover, the URL specifically states that such purposes are "declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain." *Id.*

In the present case, there can be no dispute that CCRA entered into a valid contract with DCA, and that, in this contract, DCA delegated to CCRA the responsibility to acquire the remaining real estate located in the Centralia-Conyngham Township Mine Fire Project Area, as well as the responsibility to relocate the remaining families, individuals, businesses, and churches. *See* Contract between DCA and CCRA attached to each Declaration as Exhibit "A" (the "Contract"). The Contract further provides explicitly that CCRA, in carrying out these responsibilities, would be acting as an agent of the Commonwealth, and in the name of the Commonwealth. *Id.*

Thus, CCRA was duly authorized to act as an agent of DCA in implementing the plan to acquire the properties threatened by the mine fire and to relocate the displaced residents. Accordingly, CCRA was acting as an agent for a state agency for a public purpose as set forth in the URL — *i.e.*, the provision of healthful homes and a decent living environment. CCRA, therefore, was clearly acting in accordance with the powers granted to it by the URL.

B. DCA Was Invested With The Power Of Eminent Domain To Condemn The Subject Properties.

The Contract, in effect, delegated DCA's power of eminent domain to CCRA. Thus, as is set forth in the Declarations of Taking themselves, CCRA was exercising the power of eminent domain set forth in 71 P.S. § 1049.4 (Purdon's 1990). The provisions of § 1049.4 state as follows:

> The Department of Community Affairs shall have the power, in the name of the Commonwealth, to exercise the right of eminent domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, of the same class as the city or county in which such department has approved the initiation of a project. Title to any property acquired by the department through eminent domain shall be an absolute or fee simple title unless a lesser title shall be designated in the eminent domain proceedings. If any of the real property in the area which is to be acquired has, prior to such acquisition, been devoted to another public use, it may nevertheless be acquired by condemnation: Provided, That no real property belonging to a city, county, borough, town or township, or to the Commonwealth, may be acquired without its consent. No real property belonging to a public utility corporation may be acquired without the approval of the Pennsylvania Public Utility Commission.

71 P.S. § 1049.4 (Purdon's 1990).

DCA thus properly contracted with CCRA to carry out the acquisition of property and the relocation of residents in accordance with DCA's power to "coordinate and wherever provided by law to supervise or administer the various programs of State and Federal Assistance. . . ." 71 P.S. § 670.101 (Purdon's 1990). The funds for the acquisition and relocation program in Centralia were, of course, made available to the Commonwealth through the Federal Appropriations Act of 1984. Accordingly, there was no basis for any argument by the Petitioners that DCA did not have the power to condemn the subject properties or to delegate that power to CCRA.

C. Because CCRA Was Acting As An Agent For The Commonwealth With Respect To The Condemnations, It Was Not Necessary For CCRA To File A Bond.

The provisions of § 1-403(b) of the Code state as follows:

> (b) Power of Taxation. Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

26 P.S. § 1-403(b) (Purdon's Supp. 1992). It cannot be disputed that CCRA was acting in this matter as the agent of DCA, an agency of the Commonwealth. The Commonwealth, of course, has the power of taxation. Moreover, the Federal Government has made funds available to the Commonwealth, DCA and CCRA for "the acquisition of the private homes, businesses and non-profit buildings and for the relocation of people in the Borough of Centralia and portions of Conyngham Township,

Columbia County, which properties are threatened by an underground mine fire" pursuant to the Federal Appropriations Act of 1984. The Federal Government, of course, also has the power of taxation.

Thus, CCRA, acting as the agent for the Commonwealth and with the full support of funds specifically appropriated by the Federal Government, was not required to file a bond in this case. It has been held that even though a condemnor itself does not have the power to tax, condemnation would constitute sufficient surety without a bond being filed where sufficient funds were available from other sources to cover costs. *In re City of Scranton,* 132 Pa. Commw. 175, 572 A.2d 250, 255-56 (1990), *app. denied,* 527 Pa. 131, 589 A.2d 204 (1991) (*citing Taking In Eminent Domain of Certain Parcels of Real Estate By the Redevelopment Authority of the City of Bethlehem,* 22 Pa. Commw. 487, 491, 349 A.2d 781, 786 (1976)). Accordingly, there was no merit whatever to the Petitioners' argument that CCRA should have been regained to file a bond.

CONCLUSION

The preliminary objections of the Petitioners were properly dismissed without hearing by the Pennsylvania Common Pleas Court, because those preliminary objections *did not raise any factual issues.* The Pennsylvania Common Pleas Court's decision was properly upheld by the Pennsylvania Commonwealth Court. The Petitioners' Petition for a Writ of Certiorari should be denied by this Court.

Respectfully submitted,

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